Supreme Court, U.S.
FILED

01-33 JUL 05 2001

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

Mary Elizabeth Hightower,
Petitioner

v.

Continental Cablevision of Jacksonville, Inc.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether as a matter of law an employer's offer of a part time position with reduced benefits to the disabled employee without engaging in any interactive process is a "reasonable accommodation" under the Americans with Disabilities Act, when the employee is a victim of multiple sclerosis, who was already working a full time position with full benefits and repeatedly requested only a reduction in hours?

PARTIES TO THE PROCEEDING

The petitioner is Mary Elizabeth Hightower.

The respondent is Continental Cablevision of Jacksonville, Inc., now known as MediaOne of Greater Florida, Inc. AT&T Corp. wholly owns MediaOne of Greater Florida, Inc. AT&T Corp is a publicly traded corporation that is a parent to a number of subsidiaries, some or all of which are wholly owned.

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OPINIONS BELOW

On March 5, 2001, the United States Court of Appeals for the Eleventh Circuit affirmed the grant of summary judgment in favor of Continental Cablevision of Jacksonville, Inc. ("Continental Cablevision") by the United States District Court for the Middle District of Florida, Jacksonville Division. A copy of the unpublished opinion of the Eleventh Circuit (App. A) is contained in the Appendix. On April 10, 2001, the Eleventh Circuit denied Mary Hightower's petition for panel rehearing. A copy of the denial of rehearing of the Eleventh Circuit (App. C) is contained in the Appendix.

On April 2, 1998, the United States District Court for the Middle District of Florida in an unpublished order granted summary judgment in Continental Cablevision's favor and directed entry of judgment in its favor. Copies of the summary judgment order (App. B) and of the judgment (App. D) are contained in the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

This Court has jurisdiction under section 1254(1) of Title 28 of the United States Code, 28 U.S.C. § 1254(1), to review by certiorari the opinion of the United States Court of Appeals for the Eleventh Circuit rendered on April 10, 2001.

STATUTORY PROVISION

The Americans with Disabilities Act of 1990 ("ADA") prohibits employers from discriminating against a disabled employee by:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112(b)(5)(A).

STATEMENT OF THE CASE

On April 2, 1998, the United States District Court for the Middle District of Florida granted summary judgment in favor of the defendant, Continental Cablevision, with respect to Mary Hightower's complaint under the ADA. Mary Hightower appealed to the United States Court of Appeals for the Eleventh Circuit, which held oral argument on February 24, 1999. Over two years later, on March 5, 2001, the Eleventh Circuit affirmed the grant of summary judgment and found that as a matter of law Mary Hightower had been offered a reasonable accommodation by Continental Cablevision and that the accommodation requested by Mary Hightower was not reasonable. On April 10, 2001, the Eleventh Circuit denied Mary Hightower's petition for panel rehearing.

Continental Cablevision employed Mary Hightower at the time neurologists on staff at the University of Florida's teaching hospital in Jacksonville diagnosed her as suffering from multiple sclerosis, a progressive disease. Mary Hightower's primary neurologist, Dr. Hartley, wrote letters to Continental Cablevision requesting reasonable accommodations for her job, including one on March 30,

1995 that she be "reassigned to a part-time position." Almost a year later, in February 1996, Dr. Hartley, again requested a "reasonable accommodation" for Mary Hightower, and informed Continental Cablevision in writing that "medication along with rest does help to control the disease."

After Mary Hightower missed a week of work as a customer service representative in April 1996, Continental Cablevision counseled her. Mary Hightower responded in writing by requesting an accommodation of a five-day week, six-hour day work schedule. Continental Cablevision did not respond to the request. Previously, Continental Cablevision had offered Mary Hightower part-time employment, which would have resulted in a loss of significant benefits to her. Mary Hightower described the position of Continental Cablevision in her contemporaneous written response: "I have requested from H/R-Management for [a] reasonable accommodation 6 hr shift which I felt would be very helpful with my attendance, only to find that they can only assist me with a 25-29 hr. part time shift which would remove my most vital benefits. I would like to look further into this matter with H/R or whomever can help me without removing full-time hrs or benefits."

Continental Cablevision never engaged in any interactive process with Mary Hightower and offered her only a part-time position with reduced benefits. On September 17, 1997, Gloria Jean Davis, a human resource generalist and the corporate representative of Continental Cablevision, was deposed. Davis testified concerning the offer of part-time employment to Mary Hightower as follows:

> Q. Were you personally involved in any discussions where Ms. Hightower was present

where the subject of her working part time came up?
A. You said was I present?
Q. Physically present where you were there. Firsthand knowledge, I'm asking about.
A. Yes.
Q. Okay. What do you recall was discussed?
Ms. Ullner [Continental's counsel]: Objection.
A. I recall discussing with the supervisor at the time that the schedule available, what we had available to accommodate Ms. Hightower would have been a 25 to 29 per hour workweek.
Q. Anything - - go ahead.
A. And that's basically it. That's what we had available. And that's what we would be able to offer as an accommodation.
Q. What was your understanding as to the availability of benefits for someone that worked 25 to 29 hours?
A. At the time, part time - - 25 to 29 hours, was considered part-time employment. An employee would not have health care coverage, health care, vision or dental coverage as a part-time employee. The employee would still have 401(k) benefits, free cable service and other paid benefits that they chose.
Q. If one worked 30 hours a week, what benefits would be available?
A. The same benefits I mentioned previously with addition to health insurance, dental and vision.

Deposition of Gloria Jean Davis at 117 to 118 (Sept. 17, 1997) (R1-23-117 to 118)

Mary Hightower could not accept Continental Cablevision's offer of a twenty-five to twenty-nine hour workweek part-time position with reduced benefits. Instead, Mary Hightower continued to try to work a forty-hour week pursuant to her assigned schedule. However, Mary Hightower discussed the subject of working reduced hours with the customer service manager of Continental Cablevision, who was asked in deposition "whether the company tried to work with Ms. Hightower with her disability?" to which he responded, "I couldn't speak to specifics." Continental Cablevision never responded to Mary Hightower's request for a reduced thirty-hour workweek that would have enabled her to continue in her full time position with full benefits.

On July 8, 1996, Dr. Hartley sent a note to Continental Cablevision that Mary Hightower was scheduled for an MRI on Friday afternoon, July 12, 1996. The following Monday morning, July 15, 1996, Continental Cablevision placed Mary Hightower on a mandatory development for the next thirty days. Mary Hightower responded in writing stating that in "the past I have not been given any reasonable avenues that would help in my attendance or in any other way without altering my entire life along with my medication to remain functional at work." Mary Hightower successfully completed the thirty-day mandatory development but then missed work in the beginning of September 1996. On September 17, 1996, Mary Hightower refused Continental Cablevision's request that she sign a release in return for six months current health insurance premiums and three weeks pay. Two days later, Continental Cablevision terminated her employment.

After receiving a right to sue letter, on April 8, 1997, Mary Hightower filed suit in the Middle District of Florida, Jacksonville Division. On April 2, 1998, a few days before

Mary Hightower's case was scheduled for jury trial, the district court entered summary judgment in Continental Cablevision's favor finding in part that "[t]here is no duty on the part of the Defendant to create a position for the Plaintiff. Once Defendant offered Plaintiff the reasonable accommodation of a part time job and it was rejected, Defendant discharged its duty to further accommodate Plaintiff and Plaintiff cannot demonstrate that she was otherwise qualified." The Eleventh Circuit in its March 5, 2001 decision agreed and found that "[t]he accommodation offered, a reduced work schedule of 25-29 hours per week, was reasonable. The ADA, 42 U.S.C. § 12111(9)), provides that 'part-time or modified work schedules' are reasonable accommodations, exactly what Hightower's physician opined would be reasonable." The Eleventh Circuit then found that the accommodation requested by Mary Hightower, the continuation of her full time position with full benefits but with a reduced thirty-hour workweek, was not reasonable.

In its decision, the Eleventh Circuit did recognize: "Continental's management personnel admitted that immediate supervisors have the discretion to schedule employees for work weeks from as little as ten (10) hours up to thirty (30) hours and that there are over seventeen (17) different shifts in the operations."

REASONS TO GRANT THE WRIT OF CERTIORARI

On April 16, 2001 this Court Granted Certiorari on the Ninth Circuit's Decision in *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (2000) (en banc) on the Issue of whether an Employer is Required to Assign a Disabled Employee to a Different Position as a "reasonable accommodation" under the ADA.

On April 16, 2001, a few days after the Eleventh Circuit denied Mary Hightower's petition for panel rehearing, this Court granted certiorari on the Ninth Circuit's decision in *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (2000) (en banc) on the issue of whether an employer is required to assign a disabled employee to a different position as a "reasonable accommodation" under the ADA.

In all probability, the Court will be addressing the proper interpretation of "reasonable accommodation," especially in light of EEOC regulations on the interactive process. The Court may also address the evidentiary standard for a jury determination on whether an accommodation is a "reasonable accommodation."

The evidence necessary to go to the jury on the issue of a "reasonable accommodation" is of particular import in ADA cases because this Court has very recently confirmed in *PGA Tour, Inc. v. Martin*, __ U.S. __, No. 00-24 (May 29, 2001) that "an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration."

Furthermore, the United States Court of Appeals for the Second Circuit has recently held that "Reassignment does

not constitute reasonable accommodation, therefore, where a position comparable to the employee's former placement is available, but the employee instead is assigned to a position that would involve a significant diminution in salary, benefits, seniority or other advantages in her former job." *Norville v. Staten Island University Hospital*, 196 F.3d 89, 99 (2nd Cir. 1999). The Second Circuit went on to summarize that "the law is clear that an offer of an inferior position does not constitute a reasonable accommodation where a position with salary and benefits comparable to those of the employee's former job is available." *Id.* at 100. The Second Circuit found that it was a jury issue concerning whether an offer of "part-time work [that] would have resulted in a significant cut in [the plaintiff] Norville's salary and benefits," was not comparable and that the district "court should have instructed the jury that an offer of an inferior position does not qualify as a reasonable accommodation when a comparable position is available, and charged the jury with determining whether the positions [the defendant hospital] SIUH proposed were in fact inferior and whether a comparable position was vacant." *Id.*

Even more recently, the United States Court of Appeals for the Sixth Circuit has held that an employee's refusal to accept an employer's offer of a reassignment position with a cut in pay does not automatically preclude an ADA claim. "The [EEOC's ADA] regulations instruct that employers 'should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time,' and should only reassign an individual to a lower graded position if the individual cannot be accommodated in an equivalent position. 29 C.F.R. pt. 1630, App. § 1630.2(o). Therefore, we hold that Hoskins's refusal to accept one of the lower graded positions does not automatically preclude her from being considered a 'qualified

individual with a disability.' Instead, if Hoskins can demonstrate that an equivalent position was open for which she was otherwise qualified, then she will prevail on her claim." *Hoskins v. Oakland County Sheriff's Department*, 227 F.3d 719, 728 n. 3 (6th Cir. 2000).

For these reasons, Mary Hightower requests that the Court consider her petition for writ of certiorari in light of the pendency of its decision in *US Airways, Inc. v. Barnett*, No. 00-1250. After *US Airways, Inc. v. Barnett* is decided, the Court may deem it appropriate to grant Mary Hightower's petition and vacate and remand to the Eleventh Circuit for further consideration in light of the Court's decision.

Respectfully submitted,

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